

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEBBIE R. JENKINS

Claimant

VS.

BUFFALO WILD WINGS, INC.

Respondent

AND

KEMPER INSURANCE COMPANY

Insurance Carrier

Docket No. 259,488

ORDER

Respondent appeals the June 11, 2003 Award of Administrative Law Judge Robert H. Foerschler. Respondent contends claimant failed to prove that she suffered accidental injury arising out of and in the course of her employment on the date alleged, arguing that claimant should be denied benefits. Claimant contends the Award of the Administrative Law Judge granting claimant a 15 percent impairment should be affirmed. The Appeals Board (Board) heard oral argument on December 16, 2003.

APPEARANCES

Claimant appeared by her attorney, Michael W. Downing of Kansas City, Missouri. Respondent and its insurance carrier appeared by their attorney, Thomas Clinkenbeard of Kansas City, Missouri.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, at oral argument, the parties acknowledged that the 15 percent impairment to the body as a whole awarded by the Administrative Law Judge was appropriate should the Board determine that claimant

suffered accidental injury arising out of and in the course of her employment. Therefore, the issue of nature and extent of claimant's injury is no longer before the Board, and the Administrative Law Judge's Award of 15 percent to the body as a whole is affirmed subject to the determination of the additional issues.

ISSUES

- (1) Did claimant suffer accidental injury on the date alleged?
- (2) Did claimant's accidental injury arise out of and in the course of her employment?
- (3) Is claimant entitled to past temporary total disability compensation and past medical expense?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

Claimant, who worked as a bartender and as a server for respondent, alleges accidental injury on September 1, 2000, when, while serving a table, she slipped on a water spill on the floor and fell to the ground, landing on her right side with her leg bent. Claimant testified she reported the accident to Jill Mason, respondent's general manager, who was in charge on that night. Ms. Mason, however, was never located, no longer being employed by respondent. Claimant also testified that she was helped up after the fall by a coworker named Vicky Williams. Neither Ms. Mason nor Ms. Williams testified in this matter.

However, at the preliminary hearing of November 2, 2000, respondent's regional supervisor, Grant Edmund Lowe, testified that claimant did not work on September 1, 2000, as there was no payroll record for claimant for that date. Additionally, claimant's list of tips that she maintained did not indicate any income on that day from tips. However, Mr. Lowe was asked by the court at the end of the hearing whether he had received any information regarding claimant's fall. Mr. Lowe testified that after being contacted by Pat Weaver from workers' compensation, he asked the employees about the fall and that Ms. Williams verified that claimant had fallen.¹

¹ P.H. Trans. (Nov. 2, 2000) at 55-56.

Claimant testified that she occasionally forgot to clock in, which may be why September 1 would have no record of her working. Additionally, she testified that when she initially started, she recorded her tips, but later was told by respondent's manager, Mike Clarity, not to record her tips. Mr. Lowe did acknowledge that claimant was scheduled to work Tuesdays and Fridays on a double shift. It is noted that September 1, 2000, is a Friday. Claimant would also occasionally work Wednesdays, Thursdays and Saturdays, but Tuesdays and Fridays were her normal work days, and claimant was normally scheduled double shift on both of those days.

Claimant completed her shift on the date of accident, returning the following Tuesday with significant complaints to her lower extremities and back. She testified that at that time, Mr. Clarity advised her to go to the emergency room and Ms. Williams, her coworker, actually transported her to the emergency room.

Respondent argues, and the Board acknowledges, the medical records contemporaneous with claimant's first seeking medical treatment are not supportive of claimant's position. The St. Joseph Hospital emergency room records indicate that claimant fell at home. However, claimant denies ever advising them that she fell at home. Claimant was examined by Steven Simon, M.D., a physical medicine and rehabilitation specialist, board certified in that area and in the area of pain medicine. Dr. Simon's first examination of claimant, after the alleged fall, occurred on September 11, 2000, at which time claimant reported a slip and fall at work. Claimant had been treated by Dr. Simon for prior back problems. Claimant had suffered significant injuries in 1988 when she ruptured a disc and had surgery to her back. She suffered an additional injury in 1993 and again underwent back surgery. Dr. Simon testified that claimant suffered from chronic pain and a failed back syndrome, with significant difficulties. He had examined claimant on June 14, 2000, prior to the alleged injury with respondent, diagnosing chronic pain and an altered gait and sciatica on the right side. Claimant also displayed an unusual walk pattern both on June 14 and again on June 29, 2000. He again saw her on August 23, 2000, at which time claimant's abnormal gait pattern had resolved and claimant's pain complaints were under control with medication. It was stated in the record on more than one occasion that claimant was narcotic dependent and had been so for some time as a result of her prior injuries.

Dr. Simon testified that when he examined claimant on September 11, after the work injury, her examination was markedly different from that on August 23. Claimant's pain had increased significantly as she had marked spasm in her back. Additionally, her gait pattern had changed so that she was not bearing weight on the right leg. She was also hiking her right hip, which was a different finding from what they had diagnosed the month before.

Dr. Simon also examined MRIs taken both before and after the September 1, 2000 alleged injury, with the September 21, 2000 MRI showing a herniated disc at L5, with the

disc partially extruding to the right side into the neuroforamen, which he described as the path that the root takes as the nerve exits the spinal cord. The MRI also showed degenerative disc disease at L5-S1, with possible nerve root involvement at S1 with compression from the disc material. Dr. Simon testified that the herniated disc at L5 was consistent with a sudden change in her pain level and, in his opinion, was the result of the September 1, 2000 accident. He recommended epidural injections, but the workers' compensation carrier refused authorization for the treatment. He continued treating claimant with physical therapy and manipulation. He next saw claimant on December 12, 2000, at which time claimant continued to favor the right leg. He expressed surprise that claimant had not received the injections he had earlier recommended. He next saw claimant on January 3, 2001, at which time her pain was decreasing and no evidence of spasm was found. His impression at the time was that claimant had a herniated disc with radiculopathy into the right side, but it was improving. Claimant was also seen by Colette Peabody, D.C., the rehabilitation specialist through Dr. Simon. Claimant was returned to work by Dr. Peabody as of January 2001, with the restriction that she wear a brace while at work. Dr. Simon opined claimant had a 15 percent impairment to the body as a whole pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), which has been stipulated to by the parties.

Dr. Simon acknowledged that claimant was under treatment for these same complaints prior to the alleged fall, with claimant having chronic pain syndrome for a significant period of time. However, he testified that the dramatic difference between pre- and post-September would suggest that even if the disc had been herniated before, it was clearly herniated now and claimant was experiencing an entirely new set of symptoms. He stated the 15 percent functional impairment was solely related to this particular injury.

Claimant was referred by respondent to David J. Clymer, M.D., a board certified orthopedic surgeon, for an examination. This examination, on November 14, 2000, elicited a history of the fall at work, with a further history of prior back problems, including the two previous back surgeries. Claimant advised Dr. Clymer she was having ongoing discomfort prior to her fall at work. Dr. Clymer reviewed the MRI report from the radiologist, from the September 21, 2000 radiology report, but did not have access to the diagnostic films themselves. He acknowledged the report indicated a small disc protrusion at L5-S1, but testified to a reasonable degree of medical certainty that he did not find evidence of a significant new disc injury. He also testified that claimant's ongoing treatment was related to her preexisting condition and opined that claimant had no additional impairment related to her September 2000 fall. He stated that records maintained by St. Joseph Hospital are generally accurate, with the records regarding claimant indicating that claimant's fall did not occur at work. He agreed that the MRI tests and the treatment provided to claimant were appropriate and reasonable, and would have been necessary as a result of the alleged work injury. He also acknowledged that Dr. Simon, who had examined claimant both before and after the work injury, had an advantage in separating the new versus old

pathology in claimant's back. He supported Dr. Simon's finding that claimant had an abnormal gait after the September 1 fall.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.²

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.³

Claimant alleges accidental injury on September 1, 2000, when she slipped and fell while carrying an order. The only witnesses to this incident did not testify. Additionally, the supervisor that claimant initially reported the matter to did not testify. However, respondent's representative Mr. Lowe did testify that after being contacted by workers' compensation, he talked to Ms. Williams, who supposedly witnessed the accident, and she verified that claimant had, indeed, fallen. While the lack of employment records on September 1 is somewhat of a concern, claimant did testify that when she worked for respondent, she occasionally forgot to clock in. Therefore, there may not be a record of her employment on that particular date. Additionally, Mr. Lowe verified that claimant was regularly scheduled to work Tuesdays and Fridays on a double shift, and the date of the alleged accident was a Friday.

The Board finds that claimant has proven that she suffered accidental injury on the alleged date and that this accidental injury arose out of and in the course of her employment.

Claimant alleged additional temporary total disability compensation was due and entitlement to certain medical expenses. The Award addressed these issues. The Board finds that the findings and conclusions set forth by the Administrative Law Judge with regard to claimant's entitlement to additional temporary total disability compensation and past medical expenses are set out in appropriate detail and the Board adopts those findings and conclusions as its own. The Board awards claimant a 15 percent impairment to the body as a whole as stipulated by the parties. The Award is affirmed in all respects.

² K.S.A. 44-501 and K.S.A. 44-508(g).

³ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated June 11, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Thomas Clinkenbeard, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director